Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Joint Application by BellSouth Corporation, BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc., Pursuant to Section 271 of the Communications Act to Provide In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina	)	WC Docket No. 02-150

OPPOSITION COMMENTS OF KMC TELECOM III LLC AND NUVOX, INC.

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SUMMARY

BellSouth is not in compliance with several sections of the competitive checklist and is, as a result, thwarting the efforts of local competitors like KMC Telecom and NuVox. KMC, NuVox and other CLECs are continually battling BellSouth intransigence on critical interconnection issues and suffer from deficient and discriminatory loop performance.

BellSouth fails to provide to CLECs interconnection at prices that comport with the pricing standards of Section 252(d)(1) and the Commission's TELRIC pricing rules. Indeed, contrary to BellSouth's assertion that its prices for interconnection services adhere to the pricing requirements set forth in Section 252(d) of the 1996 Act and in the Commission's pricing rules, KMC and NuVox's experience is that they have been charged tariffed access rates for interconnection trunks and facilities. Thus, the prices BellSouth actually imposes for interconnection services do not comply with the cost-based pricing standard required by the Act and the Commission's rules.

BellSouth's anticompetitive practices that use DSL to block competitor access to loops remains a severe problem. In addition, BellSouth employs clearly discriminatory loop assignment practices, a fact vividly demonstrated by BellSouth's own performance measures. Finally, loop outages continue to thwart facilities-based entry, particularly troubles following installs and repeat troubles on the same circuit. These concerns too are borne out by BellSouth's performance data.

In light of BellSouth's failure to comply with the competitive checklist, the Commission must deny BellSouth's application to enter the interLATA markets in Alabama, Kentucky, Mississippi, North Carolina and South Carolina.

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KMC Telecom III LLC ("KMC") and NuVox, Inc. ("NuVox"), by their attorneys, hereby submit these comments in opposition to the Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., (collectively "BellSouth") for authority to provide in-region, interLATA services in the States of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, pursuant to Section 271 of the Communications Act of 1934, as amended.[1]

KMC and NuVox are precisely the type of facilities-based Competitive Local Exchange Carriers ("CLECs") that this Commission has identified as central to its vision of the

[1] 47 U.S.C. § 271. *See Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Public Notice, WC Docket No. 02-150, DA 02-1453 (2002).

competitive landscape.[2] Together, KMC and NuVox compete against BellSouth in all of the states covered by BellSouth's joint application. Through its operations center located in the Southeast, KMC deploys high-speed, high-capacity fiber optic networks for the provision of various services to business customers, including local, long distance and data services. NuVox, with its primary Eastern-U.S. operations center located in South Carolina, provides broadband products and services to small and mid-sized businesses, including local voice, data and long distance services, high-speed Internet access and unified bundles of service, as well as other advanced data services such as LAN and WAN management, VPN and audio conferencing.

I. BELLSOUTH IS NOT IN COMPLIANCE WITH THE SECTION 271 COMPETITIVE CHECKLIST

BellSouth is not complying with several critical sections of the competitive checklist[3] and as a direct result is hindering local competition throughout its region. KMC and NuVox have suffered through numerous BellSouth obstacles in attempting to compete in the five States covered by the within application.

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[2] The Commission has an "ongoing commitment to the promotion of facilities-based competition" which "should focus, in particular, on both so-called 'full facilities-based' competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent." *Review of the Section 251Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, and *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Separate Statement of Chairman Michael K. Powell on Notice of Proposed Rulemaking, released December 20, 2001 (*Triennial Review NPRM*); *See also Triennial Review NPRM* at ¶9.

[3] 47 U.S.C. § 271(c)(2)(B).

KMC and NuVox continue to endure illegal and discriminatory performance in interconnecting with BellSouth and in attempting to obtain access to loops. BellSouth's conduct causes it to fail the following section 271(c)(2)(B) checklist items:

(i) – interconnection;

(iv) – access to unbundled loops, and

(xiii) – reciprocal compensation

Due to BellSouth's clear lack of compliance with the competitive checklist and anticompetitive tactics, the Commission must deny BellSouth's application. BellSouth's own self-reported performance data alone compels a finding of checklist non-compliance. There is simply no way for the Commission to find that BellSouth is eligible for interLATA entry in Alabama, Kentucky, Mississippi, North Carolina or South Carolina.

II. BELLSOUTH IS FAILING TO PROVIDE COST-BASED INTERCONNECTION IN ACCORDANCE WITH CHECKLIST ITEM I

BellSouth fails to meet checklist item i which requires a BOC to demonstrate that it offers "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[4] In particular, BellSouth fails to provide to CLECs interconnection at prices that comport with the pricing standards of Section 252(d)(1). This section of the Act provides that

[4] 47 USC § 271(c)(2)(B)(i); *see also, e.g., In the Matter of Application of Ameritech Michigan Pursuant to Section 271,* 12 FCC Rcd 20543 (1997), ¶ 282 ("Section 271(d) requires . . . the BOC to provide interconnection . . . .at prices that are 'in accordance with' section 252(d). Section 252(d) requires that the rates for interconnection, unbundled network elements and transport and termination be cost-based."), ¶ 289 ("a BOC cannot be deemed in compliance with sections 271(c)(2)(B)(i), (ii), and (xiii) of the competitive checklist unless the BOC demonstrates that prices for interconnection required by section 251, unbundled network elements, and transport and termination are based on forward-looking

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interconnection and network element charges shall be "based on cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)." 47 USC § 252(d)(1). In its first *Local Competition Order,* the FCC determined that this meant that pricing for interconnection and network elements must be based on the TELRIC methodology.[5]

BellSouth's failure in this respect comes in the charges it imposes upon KMC and NuVox for trunks and facilities used for interconnection. In fact, contrary to BellSouth's assertion that its prices for "interconnection services adhere to the pricing requirements set forth in the 1996 Act (Section 252(d)) and in the FCC's pricing rules",[6] KMC and NuVox's experience is that they have been charged tariffed access rates for interconnection trunks and facilities that do not comply with the cost-based pricing standard required by the Act and the Commission's rules.[7]

BellSouth's noncompliance may to some extent be attributable to the fact that it requires CLECs to order interconnection trunks and facilities through the ASR. Once interconnection orders are placed via the ASR, BellSouth apparently cannot distinguish them

economic costs."), ¶ 290 ("for purposes of checklist compliance, prices for interconnection and unbundled network elements must be based on TELRIC principles").

[5] *Local Competition Order,* ¶¶ 628 (FCC pricing rules apply to both interconnection and UNEs); 672 (adopting the TELRIC standard for interconnection and UNEs); 1062 (describing the applicability of dedicated transport UNE pricing to interconnection); 1091 (recognizing carriers' rights to use cost-based UNEs for interconnection). The U.S. Supreme Court recently affirmed TELRIC in all respects. *Verizon v. FCC*, 122 S. Ct. 1646 (2002).

[6] Joint Affidavit of John Ruscilli and Cynthia K. Cox on behalf of BellSouth, ¶ 12.

[7] Notably, the current KMC and NuVox current interconnection agreements contain identical provisions providing for "bill and keep" on most but not all interconnection trunks and facilities. Although this ameliorates the problem to some extent, it does not diminish BellSouth's failure to apply cost-based pricing where bill-and-keep does not apply.

from orders for special access (although BellSouth may have acquired such capability recently). Thus, despite having an obligation to provide KMC, NuVox and other CLECs with interconnection trunks and facilities at state commission approved cost-based TELRIC rates (*i.e.,* UNE rates), BellSouth historically has charged NuVox and other CLECs special access rates. This practice plainly is in violation of Section 252(d)(2) of the Act and of the Commission's pricing rules set forth in the *Local Competition Order*.[8]

BellSouth has yet to fully reform this unlawful practice. Recent versions of BellSouth's "standard" interconnection agreement request that competitors report a "PLF" (percent local facility), so that BellSouth can use that factor in conjunction with PIU factors (reported for other purposes) to *ratchet* charges for interconnection trunks, with a portion of the trunks and facilities used for "local traffic" being billed at TELRIC rates and a portion of the trunks used to carry interexchange traffic at special access rates (state and federal).[9] Although

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[8] The practice also is plainly anticompetitive. By imposing access charges for interconnection, BellSouth artificially and unlawfully drives-up its competitors' costs of doing business. In the end, consumers are left footing the bill for this anticompetitive practice.

[9] *See, e.g.,* BellSouth Second Quarter 2001 Standard Interconnection Agreement, Att. 3, Secs. 3.3.1 ("The charges applied to the portion of the Local Channel used for Local Traffic as determined by the PLF are as set forth in Exhibit A to this Attachment."); 3.3.2 ("The charges applied to the portion of the Dedicated Interoffice Facility used for Local Traffic as determined by the PLF are as set forth in Exhibit A to this Attachment."); 7.3 ("**Percent Local Facility**. Each Party shall report to the other a Percent Local Facility ("PLF"). The application of the PLF will determine the portion of switched dedicated transport ordered to be billed per the local jurisdiction rates. The PLF shall be applied to Multiplexing, Local Channel and Interoffice Channel Switched Dedicated Transport utilized in the provision of local interconnection trunks. Each Party shall update its PLF on the first of January, April, July and October of the year and shall send it to the other Party to be received no later than 30 calendar days after the first of each such month to be effective the first bill period the following month, respectively. Requirements associated with PLU and PLF calculation and reporting shall be as set forth in BellSouth's Jurisdictional Factors Reporting Guide, as it is amended from time to time."). <http://www.interconnection.bellsouth.com/become_a_clec/ics_agreement/att03.pdf> (marked "Version 2Q01: 06/15/01") (available on BellSouth's website as of the date of this filing). The initial version of

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this standard interconnection agreement language is not included in either KMC's or NuVox's interconnection agreements with BellSouth, BellSouth has imposed the PLF regime unilaterally (and unlawfully). Nothing in the Act or the Commission's orders and rules interpreting and implementing its obligations authorizes this approach. The FCC's pricing rules are clear: interconnection must be provided at cost-based rates. Special access rates clearly do not meet the required TELRIC standard.

In defense of its imposition of non-cost-based rates via the application of PIU and PLF factors (often manufactured or artificially set at unfavorable default levels by BellSouth), BellSouth has asserted that it is obligated to provide interconnection only for local traffic and therefore it is entitled to charge access rates for interconnection trunks and facilities (or portions thereof) for interexchange traffic. This "defense," however, already has been squarely rejected by the Commission. In its Local Competition First Report and Order, the Commission affirmed that a requesting carrier is entitled "under the statute to obtain interconnection pursuant to section 251(c)(2) for the 'transmission and routing of telephone exchange service and exchange access.'"[10] Indeed, the Commission further rejected the point of view that cost-based interconnection is only for local traffic by determining that "parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2)."[11] Thus, a requesting carrier offering either telephone exchange service or exchange access -- or both telephone exchange service and exchange access -- is entitled to cost-based interconnection. KMC and

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BellSouth's Jurisdictional Factors Reporting Guide was posted on BellSouth's website in August 2001. A second version of the Guide, posted in December 2001, introduced a form for PLF reporting.

10 *Local Competition Order,* ¶ 190. (quoting 47 USC § 251(c)(2)); *see also id.* ¶¶ 176; 184-85, 191.

11 *Id.* at ¶ 185.

NuVox provide both telephone exchange service and exchange access services and thus are clearly entitled to cost-based interconnection under the Act and the Commission's rules.

In fact, the only instance under the Act and the Commission's rules where a requesting carrier is *not* entitled to cost-based interconnection is where the requesting carrier is *exclusively an IXC* and it "requests interconnection *solely* for the purpose of originating or terminating its *interexchange* traffic."[12] BellSouth's practice of charging KMC, NuVox and other CLECs access rates for interconnection and its new PLF/ratcheted interconnection billing scheme do not comport with the Act or the Commission's rules. Under the Commission's rules, a carrier either pays cost-based rates for interconnection or – if that carrier seeks interconnection only for the purpose of originating or terminating its own interexchange traffic – it pays access. In short, it is either/or and not a combination thereof, as is contemplated by BellSouth's PLF ploy.

BellSouth also has asserted that Section 251(g) preserves its ability to charge access for interconnection used for the transmission and routing of anything other than local traffic. Aside from ignoring the Act and the Commission rules just discussed, this argument also has been squarely rejected by the Commission in its *Local Competition First Report and Order.* The Commission explicitly found that Section 251(g) "does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing unbundled

[12] *Id.* at ¶ 191 (emphasis added).

elements."[13] Given that the pricing standards of Section 252(d)(1) govern both interconnection and network element charges, the same conclusion certainly applies to interconnection.

Thus, until BellSouth reforms its practice of unlawfully charging non-cost-based special access rates for interconnection trunks and facilities, it cannot demonstrate compliance with checklist item i. The Act and the Commission rules obligate BellSouth to provide cost-based (TELRIC) interconnection and to honor the terms of its interconnection agreements. BellSouth must demonstrate compliance with these requirements before its Section 271 application can be approved.

III. BELLSOUTH IS NOT PROVIDING ACCESS TO LOOPS IN ACCORDANCE WITH THE CHECKLIST

"Enabling CLECs to gain meaningful access to essential facilities controlled by ILECs thus remains crucial to promoting facilities-based competition."[14] KMC Telecom and NuVox agree, since they are two of the facilities-based competitors that the Commission has identified as integral to its view of the competitive landscape.[15] Although the Commission has required that the Regional Bell Operating Companies' loop performance afford competitors a "meaningful opportunity to compete,"[16] BellSouth has failed to meet that standard. In analyzing

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[13] *Local Competition Order*, ¶ 362 (explaining that the "primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by the means of unbundled elements purchased from an incumbent.").

[14] *Triennial Review NPRM*, Separate Statement of Commissioner Kevin J. Martin.

[15] "[T]he promotion of facilities-based competition should be a fundamental priority of this Commission." *Id.; See also* fn. 2, *supra*.

[16] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum

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loop performance, the Commission has also stated that it will "look for patterns of systemic performance disparities that have resulted in competitive harm."[17] The Commission need not look very hard to find such patterns and harm in this proceeding.

In its order on BellSouth's application for Georgia and Louisiana, the Commission may have inadvertently discounted the concerns of facilities-based competitors such as KMC. While recognizing that BellSouth's high capacity loop performance was "out of parity for several recent months" in two important measures,[18] the Commission concluded that such performance did not "warrant a finding of checklist noncompliance."[19] Since these could not have been considered "isolated cases of performance disparity" where the "margin of disparity is small,"[20] the Commission apparently based its conclusion on "BellSouth's generally acceptable performance for all other categories of loops . . . recognizing that high capacity loops make up a small percentage of overall loop orders[.]"[21] While high capacity loops are certainly just one segment of the market, it is, practically speaking, the *only* segment that matters to KMC. Thus,

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Opinion and Order, 15 FCC Rcd 3952, 4098, para. 279 (1999) ("*New York 271 Order*"); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant To Section 271 Of The Telecommunications Act Of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, para. 251 (2000) ("*Texas 271 Order*"); *Georgia/Louisiana II Order* at para. 219.

17 *Georgia/Louisiana II Order* at para. 219.

18 Percentage of troubles found within 30 days following installation of and the percentage of missed installation appointments (Georgia and Louisiana B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loop >= DS1/< 10 circuits/Dispatch); Louisiana B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loop >= DS1/<10 circuits/Dispatch).

19 *Id.*

20 *Georgia/Louisiana II Order* at para. 232, *citing Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 22.

21 *Id.*

BellSouth's "systemic performance disparities" have without a doubt "resulted in competitive harm" to KMC and to similarly situated carriers. Unless the Commission forces BellSouth to improve its high capacity loop performance by denying this application, facilities-based carriers like KMC will have no meaningful opportunity to compete and may eventually be forced to exit the market.

BellSouth's loop performance fails the Commission's well-established standards for access to loops in Alabama, Mississippi, North Carolina and South Carolina.[22] BellSouth's unsatisfactory performance includes discriminatory loop assignment procedures, poor provisioning performance, substandard hot cut coordination, and horrible maintenance and repair.

In addition to BellSouth's often horrendous performance, the incumbent continues to *actively* block access to customers. Although this issue was raised in the proceeding evaluating BellSouth's Section 271 application for Georgia and Louisiana, KMC is concerned that the Commission may not have recognized the full import of this problem as it relates to facilities-based competitors. Simply put, facilities-based competitors cannot compete without access to loops. Competitors cannot access a loop when BellSouth blocks the line with DSL.

In fact, even when a competitor attempts to win a customer by offering its own voice and DSL/data package, the CLEC is thwarted by BellSouth's policy to remove its DSL service prior to even accepting the CLEC order. As a result, each potential CLEC customer is forced to go without DSL service during the entire time it takes to submit, process and provision

[22] Kentucky is not included in this analysis since KMC has not built out local service facilities in that state, as it has in the four other states addressed herein.

the order. Many customers, particularly business customers, are unwilling to tolerate such an Internet access outage and choose instead to remain with BellSouth.

In a policy move with no possibly valid basis, BellSouth assigns DSL service to the primary line of multi-line customers. This policy, combined with BellSouth's refusal of DSL service to end users who receive voice service from CLECs, effectively prevents huge numbers of customers from receiving the benefits of competition. These deliberately anti-competitive actions further deprive KMC and other competitors of any meaningful opportunity to compete.

A. BellSouth Assigns Loop Facilities in a Discriminatory Fashion.

A significant source of frustration and delay when customers attempt to switch to KMC is lack of available facilities. In such cases, BellSouth designates the CLEC order as "held, pending facility" and sends the competitor a notice that the order is in jeopardy of not being completed. BellSouth's own data reveals the magnitude of the problem, and demonstrates just how discriminatory its facility-assignment procedures are:

Percent of Orders Placed in Jeopardy Status
Digital Loops DS-1 and Above
April, 2002
(All CLEC Orders, Mechanized) [23]

State	BellSouth	CLECs
Alabama	9%	**78%**
Mississippi	12%	**87%**
North Carolina	14%	**64%**
South Carolina	17%	**80%**

[23] *See* BellSouth Monthly State Summary, Metric B.2.5.19, Percent Jeopardies – Mechanized.

This performance is even worse than the BellSouth Georgia performance reviewed in the prior proceeding:

Georgia	BellSouth	CLEC
January, 2002	3%	**43%**
February, 2002	4%	**56%**
March, 2002	6%	**59%**

BellSouth will certainly claim, as it has in the past, that its indefensible pending facility performance has less of an impact than one would suspect based on the highly skewed ratios noted above. The truth is, however, that this discrimination impedes competition and cannot be ignored.

BellSouth has actually highlighted one of the problems that results from placing CLEC orders in jeopardy status. "When a jeopardy is issued, some of the time that would otherwise be allocated for testing and turn up of the circuit may be lost in trying to resolve the jeopardy."[24] "The tradeoff to meet the customer due date may increase the potential for error."[25] Thus, the higher the incidence of jeopardies, the more likely the circuit will fail once installed – a fact confirmed by the significantly higher trouble rates for CLEC loop installs noted in section III. B., below.[26]

[24] *Georgia/Louisiana II* proceeding, CC Docket 02-35, BellSouth *ex parte* filing, April 17, 2002, at page 3.

[25] *Id.*

[26] Indicating CLEC trouble rates within first 30 days of install are 2.5 to 5 times higher than they are for analogous BellSouth retail circuits.

The effect of the discriminatory facility assignment practices on the number of missed install appointments, however, is likely to be understated since many CLEC orders will be cancelled once put into pending facility status. Once the orders facing facility issues are removed from the calculation of the metric capturing installations completed on time, the reported performance automatically improves. The harmful effect on competition does not change, however, as the customer still does not receive the service he or she expected.

For those orders actually completed, the lack of facility designation impedes competition by delaying the customer's switch to the competitor and thereby preventing the CLEC from meeting the expected (and BellSouth-established) install date. These otherwise avoidable effects are caused by BellSouth's failure to verify the existence of facilities at the appropriate time, and the resultant inability to provide an accurate and reliable order confirmation. According to testimony in the proceedings below, BellSouth conducts only a cursory check of its records prior to confirming the order and scheduling the install.[27] It is only when the due date for the install arrives that BellSouth verifies the necessary facilities exist.[28]

In many instances, BellSouth records will indicate that a satisfactory circuit exists, only to be proven incorrect when the time comes to turn up that circuit. That is, technicians frequently find a "record discrepancy" or "defective facility" only when they arrive to install service – either of which will in all likelihood prevent an order from being provisioned

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[27] In the North Carolina proceeding, BellSouth witness Ainsworth readily admitted that "we do not do the pre-FOC check." NCUC Tr. Vol. 7, at 241.

[28] *Id.*

as scheduled.[29] This leads to a delayed install and provides inadequate notice to both the CLEC and the end user that the change in service providers will not take place as scheduled.

Despite BellSouth's awareness of the importance of the install date to the CLECs, and the fact that it does not check facilities before establishing the install date, BellSouth still fails to verify the existence of actual, working circuits prior to the install date. In other words, neither BellSouth nor the CLEC would know that the facility assigned to the competitor is defective until the due date, when "[the technician] got to the site."[30]

Although BellSouth attempts to justify the failure to meet its install commitments by claiming that retail customers suffer the same fate,[31] there is no equivalent to a Firm Order Confirmation on the retail side.[32] In addition, BellSouth has no data indicating the frequency with which it advises its retail customers that facilities are not available.[33]

Despite the shortcomings in its procedures noted above, BellSouth relies on the mere existence of procedures in attempting to meet its burden of proof. Here too, BellSouth fails. The company admits, for example, that it had not investigated whether its technicians were actually *following* the prescribed procedures. BellSouth also acknowledges, as it must, that

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[29] NCUC Tr. Vol. 7, at 243 (Ainsworth). Although Mr. Ainsworth stated that technicians "should" attempt to locate a spare facility and "should" test for adequacy, he claimed a lack of knowledge when asked whether the technicians are actually undertaking those activities. *Id.* At Mr. Ainsworth's suggestion, BellSouth witness Heartley was asked what proof he had that technicians were following the proper practices in North Carolina, but was able to provide none. NCUC Tr. Vol. 8, at 283-88.

[30] NCUC Tr. Vol. 7, at 248 (Ainsworth).

[31] *See, e.g.,* NCUC Tr. Vol. 7, at 241 (Ainsworth) ("That's just not part of the process for retail, and it certainly is not the process for wholesale").

[32] *Id.* at 239 (Ainsworth).

compliance may vary by region and can affect new installs, hot cuts and repair performance, and that the company was not aware of the corrective measures undertaken by other RBOCs to ensure compliance with checklist item four.[34] BellSouth has simply failed to adduce appropriate evidence on these subjects.

B. Installation Problems and Chronic Outages Plague BellSouth's UNE Loops.

When BellSouth finally provides UNE loops, outage problems begin. The BellSouth loop outages are so endemic as to prevent UNE-loop competition.[35]

Percent of Provisioning Troubles within 30 days April, 2002 (CLEC Aggregate Data)		
UNE Digital Loops Below DS-1		
State	**BellSouth**	**CLECs**
Alabama	1%	**2.5%**
Mississippi	3%	**9%**
North Carolina	2%	**10%**
South Carolina	4%	**9%**
UNE Digital Loops DS-1 and Above[36]		
State	**BellSouth**	**CLECs**

[33] *Id.* at 244-45 (Ainsworth). When BellSouth witness Ainsworth was asked whether he had any way of knowing how the level of the facility shortage advisories given to CLECs compared to the level of advisories given to retail customers, his answer was a simple "no." *Id.* at page 245.

[34] *See, e.g.*, Cross examination of BellSouth witnesses Ainsworth and Heartley before the South Carolina Public Service Commission, July 2001, Docket 2001-209-C.

[35] KMC believes that its outage problems may be even more severe than the CLEC aggregate numbers indicate, since it generally competes in the Tier III cities that most other companies ignore. Although these cities are apparently also ignored by the BellSouth capital expenditure planners, they are an important component of the Commission's goals of widespread competition and broadband deployment.

[36] Metric B.2.19.19.1.1.

Alabama	3%	**12%**
Mississippi	6%	**18%**
North Carolina	7.5%	**11%**
South Carolina	6%	**15%**

Once again, this performance is even worse than BellSouth's Georgia performance:

Georgia, DS-1 and above	**BellSouth**	**CLECs**
February, 2002	2%	**8%**
March, 2002	2%	**8%**

Chronic outages, or repeat troubles, are another huge problem. BellSouth's own reported performance indicates that 21% of the DS-1 and higher loop troubles were on loops with a trouble in the preceding 30 days.[37] For digital loops below the DS-1 level, the repeat trouble percentage was over 13%.[38] In fact, the regionwide customer trouble report rate for CLEC DS-1 and higher circuits was 4.6% in April, 2002, versus just 0.84% for BellSouth retail business customers. Thus, based on its own performance data, BellSouth cannot credibly claim to be in compliance with the checklist standards for loops.[39]

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[37] BellSouth regionwide data, as reported to Alabama PSC June 27, 2002. The Alabama-specific number is also 21%.

[38] *Id.* The figure for Alabama was 12.5%. For analog loops, CLECs suffered repeat outages on BellSouth loops with a 10% frequency on non-designed loops and 7% frequency on designed loops.

[39] *See, for example, New York 271 Order*, at para. 224. The Commission stated that "in order to compete effectively in the local exchange market, competing carriers must be able to access maintenance and repair functions in a manner that enables them to provide service to their customers at a level of quality that matches the quality of service that Bell Atlantic provides its own customers." *Id.* at para. 222, *citing Application of BellSouth Corporation for Provision of In-Region, Inter-LATA Services in Louisiana*, 13 FCC Rcd 20599, 20694 (1998) ("*Second BellSouth Louisiana Order"*).

C. BellSouth Employs "DSL-Blocking" to Unlawfully Limit Access to UNE Loops.

In addition to its performance-related checklist violations, BellSouth is intentionally and unlawfully denying access to loops by engaging in what can best be described as "DSL blocking." The Florida Public Service Commission has, in fact, just determined that BellSouth's practice of disconnecting its DSL service when customers switch voice providers "has a direct, harmful impact on the competitive provision of local telecommunications service."[40] The Florida PSC found that BellSouth's practice "unduly prejudices or penalizes those customers who switch their voice service, as well as their new carrier."[41] Ultimately, the Florida PSC concluded that the practice was a "barrier to competition"[42] and required BellSouth to continue to provide its DSL service "even when BellSouth is no longer the voice provider."[43]

BellSouth's blatantly discriminatory tactics have taken several different forms.[44] The first discriminatory method involves BellSouth placing DSL service on the primary or billing telephone line of a multi-line customer's account. These multi-line customers, in turn, almost always have a feature called hunting, that permits calls to roll over to a spare line if the primary line is busy. Since BellSouth has made a "business decision" to not offer its DSL

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40 *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996,* Docket No. 010098-TP, Issued June 5, 2002, at page 10 (*Florida PSC DSL Order*).

41 *Id.*

42 *Id.* at page 11.

43 *Id.* at page 10.

44 *See, e.g.,* NCUC Tr. Vol. 10, at 391-92 (Withers) and 397-98 (Swaim).

service on UNE loops,[45] assignment of DSL to the primary line prevents CLECs from obtaining the loop and serving that end user. Without access to the primary line, the remainder of the lines on a customer's account cannot be transferred; even if they could, the secondary or roll-over lines are useless without the primary line to which all incoming calls are initially directed.[46]

While BellSouth claims that it has a policy to install the DSL service on whichever line the end user requests, its testimony reveals that policy may in fact be illusory since it is far from clear what script its service representatives are supposed to follow.[47] Most significantly, however, it is clear that BellSouth does not explain to customers that they will be prevented from enjoying the benefits of competition if DSL is placed on their primary line.[48] The Commission must require actual evidence from BellSouth that proves it is not blocking access to loops through improper or uninformed assignment of DSL.[49]

BellSouth's second discriminatory tactic involves customers who have already made the switch to a competitor. When BellSouth sells DSL service to a CLEC end user customer, it will insist on transferring back to itself a voice line as well. The voice line that it transfers, however, almost always will be that customer's *primary* line.[50] Once BellSouth effects

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45 NCUC Tr. Vol. 8 at 14, 17 (Williams). "[W]e're not gonna allow the data service to remain on the line if it's converted over."

46 *Id.* at page 16.

47 NCUC Tr. Vol. 8 at 18.

48 *Id.*

49 At a minimum, the Commission must follow up on the vague and unsupported representations made by BellSouth during the Georgia II/Louisiana IV proceeding in this regard. *See, for e.g.,* BellSouth March 19, 2002, DSL *ex parte; Georgia/Louisiana II Order* at ¶157 and fn. 565; KMC *ex parte* May 2, 2002.

50 NCUC Tr. Vol. 10, at 391-92 (Withers) and 397-98 (Swaim).

this primary line transfer, the CLEC is left with nothing but useless secondary lines.[51] Since BellSouth could easily engage in line splitting, or transfer a secondary line, this primary line transfer is completely unnecessary[52] and has no legitimate objective.[53]

Another imaginative BellSouth tactic is its refusal to provide DSL service on the same line over which an end user subscribes to a CLEC's voice service. That is, an end user customer cannot utilize a CLEC for voice service and receive BellSouth's DSL service over the same line, but instead must either purchase a CLEC's voice service on one line and purchase a separate second line for BellSouth's DSL service, or take BellSouth's voice service and BellSouth's DSL service on the same line. In August 2001, the Louisiana Public Service Commission Staff found this conduct "rather disturbing" and recommended that BellSouth be ordered to provide its DSL service directly to the end user via the same UNE loop that the CLEC is utilizing to provide voice service to the end user.[54] Accordingly, the Louisiana Public Service

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51 NCUC Tr. Vol. 10 at 391-92 (Withers) and 397-98 (Swaim)

52 *See* NCUC Tr. Vol. 8, at 17 (Williams).

53 Although BellSouth claims that "KMC should not blame BellSouth if end-users request BellSouth to provide ADSL on the primary number," (Tr. Vol. 8, at 468 (Page 29 of Williams' Pre-filed Rebuttal) BellSouth certainly should be faulted if it is transferring primary lines to itself and assigning DSL service to those lines without first obtaining an informed consent from the customer. As one State Commission that eventually found checklist compliance appropriately stated, "[d]uring the transition to local competition, practices that tend to diminish customers' choices or hinder market entry by competitors will be carefully scrutinized." *Petition of MCI Telecommunications for a Declaratory Ruling Regarding Availability of New York Telephone Toll Services to Competitive Local Exchange Company Customers*, New York PSC Case 98-C-0799, Declaratory Ruling, at 9 (Dec. 7, 1998).

54 Louisiana Public Service Commission, ex parte, *Consideration and review of BellSouth Telecommunications, Inc.'s preapplication compliance with Section 271 of the Telecommunications Act of 1996 and provide a recommendation to the Federal Communications Commission regarding BellSouth Telecommunications, Inc.'s application to provide interLATA services originating in-region,* Docket No. U-22252 (E), *Staff's Proposed Recommendation* at 86 (Aug. 31, 2001).

Commission initiated a docket to further study this practice and is presently considering comments submitted in that proceeding.[55]

Since BellSouth's practices virtually eliminate customer choice and severely hinder market entry, and since there is no justification for assignment of DSL to the primary line, BellSouth should be specifically prohibited from continuing to do so.[56] The Commission must clearly articulate a policy that will stop this insidious practice.

Finally, as noted earlier, BellSouth requires that its DSL service be removed from a customer's account prior to the acceptance of a CLEC order.[57] So even when a competitor offers its own voice and DSL/data package, competition is thwarted since many customers are not willing to suffer a prolonged loss of Internet access while their order is submitted, processed and provisioned. As discussed in Section III. A., above, this time period is often quite extensive due to the pervasive pending facility problems.

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[55] *In re: BellSouth's Provision of ADSL Service to End-Users Over CLEC Loops*, Louisiana Public Service Commission, Docket No. R-26173 (Dec. 7, 2001). On January 18, 2002, several interested parties filed comments in this docket, including KMC, the Southeastern Competitive Carriers Association, NewSouth Communications Corp., ITC^DeltaCom Communications, Inc., ACCESS Integrated Networks, Inc. and Xspedius Corporation.

[56] In the absence of a specific, informed and memorialized customer request, BellSouth must be prohibited from assigning DSL service to the primary line of multi-line customers and from transferring back to itself a CLEC customer's primary line in response to a request for DSL service from the end user. BellSouth's DSL witness admitted on the record in the Florida 271 proceeding that the way to avoid blocking access to customers with DSL is to "put the ADSL on another line. I think that's the answer." Florida Public Service Commission Docket No. 960786-TL, cross examination of BellSouth witness Thomas Williams, at Tr. Vol. 5, 713

[57] While permitting the CLEC to act on the customer's behalf to remove the DSL USOC (Affidavit of Ken Ainsworth at ¶229) is a step in right direction – and one of several that KMC had suggested – it is only one small part of the solution.

In sum, BellSouth is improperly using a customer's decision to obtain DSL service to *physically* foreclose competitors' ability to provide voice service to that customer. While these policies already block access to well over half a million customers,[58] BellSouth's goal of reaching 1.1 million DSL end users in 2002[59] will significantly exacerbate the problem.

The Commission should find, as the Florida PSC has (based on a lengthy evidentiary record), that the BellSouth policy of tying its voice and DSL services "unreasonably penalizes customers" who desire CLEC voice service and BellSouth DSL and as such is a barrier to competition in contravention of the Act.[60] The Commission must not approve this application until such time as BellSouth ceases the unlawful tying of its DSL and voice products. While BellSouth continues its anti-competitive practices, it cannot be found to be in compliance with the checklist.

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58 BellSouth press release (Jan. 3, 2002) ("BellSouth Corp. (NYSE: BLS) today announced that it has *nearly tripled its DSL customer base* with 620,500 customers in 63 total markets. This marks an increase of 405,500 customers in 2001, which represents a growth rate of 188%, the highest of any DSL or cable provider in the country. The success of this initiative is largely due to BellSouth's focus on customer service and its execution of the *most aggressive DSL deployment strategy in the industry*, increasing the company's potential customer base from 45% to 70% of households in the markets that BellSouth serves.") (*emphasis added*).

59 *Id.*

60 *Florida PSC DSL Order*, at pages 10-11.

IV. CONCLUSION

For the foregoing reasons, KMC and NuVox respectfully request that the Commission find that BellSouth has not complied with Section 271 and deny the application accordingly.

Respectfully submitted,

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